REMARKS/ARGUMENTS

Claims 1-19 in the case are pending. Claims 1, 7, 9, 11, 16 and 18 have been rejected under 35 U.S.C. §102(b) as being anticipated by Kramer et al (5,269,190). Claims 6 and 15 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Kramer in view of Esser et al (US 2003/0188585). Claims 10 and 18 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Kramer (5,269,190). Applicant acknowledges with great appreciation the Examiner's indication of allowable subject matter recited in dependant Claims 2, 8, 12, 13, and 17.

A supplemental Declaration under 37 C.F.R. §1.67 is attached herewith to correct the priority deficiency present in the earlier filed Declaration.

The Office Action objects to the abstract for containing the word "comprises". The Applicant has herein amended the Abstract to remove this term.

Claims 1, 7, 9, 11, 16, and 18 are rejected under 35 U.S.C. 102(b) being anticipated by Kramer et al, as indicated above. In response, the Applicant has amended base Claims 1 and 11 as discussed below. The Applicant respectfully submits that the amendments are supported in the disclosure generally, and in particular at paragraphs 30 and 40, and in Fig. 1.

With respect to Claim 1:

The Applicant respectfully submits that all elements of the Applicant's amended Claim 1 are not disclosed in Kramer. In particular the following elements of amended Claim 1 are not disclosed in Kramer:

(i) *an upper plate having a top surface and mounted in the apparatus such that a displacement force exerted on the top surface by visco-elastoplastic media above the upper plate will move the upper plate a displacement distance downward toward a base*;

and:

(ii) *wherein an area between the upper plate and the base is substantially sealed to prevent entry of visco-elastoplastic media into the area when the apparatus is buried in the visco-elastoplastic media.*

With respect to independent Claim 1, the Applicant respectfully submits that Kramer discloses an apparatus for rheological testing of a sample of visco-elastoplastic media wherein the media is placed between two members. Claim 1 has been amended to clearly specify that the presently claimed apparatus is adapted to be buried in the visco-elastoplastic media, typically soil, such that a force "exerted on the top surface by visco-elastoplastic media above the upper plate" moves the upper plate. In order to function when buried the area between the upper plate and the base is sealed such that no visco-elastoplastic media is present therein.

The Applicant respectfully submits that Kramer does not disclose a visco-elastoplastic media above the upper plate, and further clearly shows the visco-elastoplastic media being tested is located between members construed by the Examiner as corresponding to the Applicant's upper plate and base, contrary to the limitations of amended Claim 1 wherein it is specified that this area is sealed against entry of visco-elastoplastic media.

The Applicant respectfully submits that claims depending from amended base Claim 1 are therefore also not anticipated or made obvious by the cited prior art.

With respect to Claim 11:

The Applicant respectfully submits that all elements of the Applicant's amended Claim 11 are not disclosed in Kramer. In particular the following elements of amended Claim 11 are not disclosed in Kramer:

(i) *providing an upper plate having a top surface, and a base and locating the base and upper plate at a desired depth under the surface of the visco-elastoplastic media*;

and:

(ii) *orienting the upper plate relative to the base such that a displacement force exerted on visco-elastoplastic media above the top surface will move the upper plate a displacement distance downward toward the base.*

With respect to independent Claim 11, the Applicant respectfully submits that Kramer discloses an apparatus for rheological testing of visco-elastoplastic media wherein a sample of the media is placed between two members, and does not disclose locating the base and upper plate at a desired depth under the surface of the visco-elastoplastic media. Claim 11 has been amended to clearly specify that the presently claimed method requires that the upper plate and base be buried in the visco-elastoplastic media, typically soil, such that a force "exerted on the top surface by visco-elastoplastic media above the upper plate" moves the upper plate.

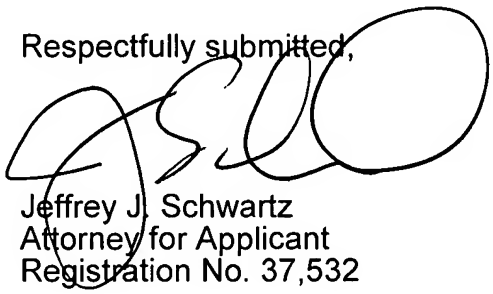
Further, Kramer does not disclose exerting a load force on the visco-elastoplastic media and measuring the displacement distance moved by the upper plate, located under the media, in response to the load force applied to the media. In contrast, in Kramer the force is exerted on the media by the member cited by the Examiner as corresponding roughly to the upper plate, with the media being essentially squeezed between two members, with the force and deformation being measured.

The Applicant respectfully submits that claims depending from amended base Claim 11 are therefore also not anticipated or made obvious by the cited prior art.

Conclusion:

For all these reasons discussed above, Applicant submits that all of the claims in the case are now in condition for allowance. Such action is therefore respectfully requested at an early date. If the Examiner believes that issues remain for discussion, she is invited to contact the undersigned at the telephone number indicated below.

Respectfully submitted,



Jeffrey J. Schwartz
Attorney for Applicant
Registration No. 37,532

Jeffrey J. Schwartz
Schwartz Law Firm, P.C.
SouthPark Towers
6100 Fairview Road, Suite 530
Charlotte, North Carolina 28210
Tel: 704-552-1889
Fax: 704-552-1866
Email: jjs@schwartz-iplaw.com